NO. 20213

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD WORTH MENEFIELD and
MARY THOMPSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTION AND STATEMENT OF THE CASE

Appellants Menefield and Thompson were severally indicted by a Federal Grand Jury on October 23, 1963, in three counts of a six count indictment, for violation of Title 18, United States Code, Section 659 [C. T. 2]. 1/ The appellants were named as defendants only in Counts 2, 4 and 6. Each of said counts charged possession of goods stolen from interstate shipments.

1/ C. T. refers to Clerk's Transcript of Record.

Count 2 charged appellants, together with convicted, non-appealing co-defendant Henry Luther Tate, with possession of 185 cartons of aluminum coffee makers, which had been embezzled (by Tate), from an interstate shipment, valued in excess of $100.

Count 4 charged appellants, together with convicted, non-appealing co-defendant Tate, with possession of 108 cartons of rubber footwear which had been embezzled (by Tate) from an interstate shipment, valued in excess of $100.

Count 6 charged appellants, together with convicted, non-appealing co-defendant Tate, with possession of 28 cases of men's shoes which had been embezzled (by Tate) from an interstate shipment, valued in excess of $100.

On July 29, 1963, a motion was noticed and made by appellant Menefield for the suppression of certain evidence. After hearing before the Honorable Charles H. Carr, the motion was denied [R. T. Vol. A; 1-56]. 2/

On January 22, 1964, following trial by the Court, the Honorable Charles H. Carr found each of appellants Menefield and Thompson guilty on Counts 2 and 4 and not guilty on Count 6 [C. T. 18].

On February 17, 1964, appellant Menefield was sentenced to the custody of the Attorney General for a period of six years on each count, to run concurrently [C. T. 17].

2/ R. T. refers to Reporter's Transcript of Proceedings.

On March 9, 1964, the imposition of sentence on appellant Thompson on Counts 2 and 4 was suspended, and appellant Thompson was placed on three years' probation on each count, to run concurrently [C. T. 19].

On February 18, 1964, and March 19, 1964, appellants Menefield and Thompson, respectively, filed timely notices of appeal [C. T. 21-22].

Jurisdiction of the District Court rested on Title 18, United States Code, Section 3231 and Title 18, United States Code, Section 659. This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

The indictment in this case was brought under Title 18, United States Code, Section 659, which in pertinent part provides as follows:

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motor truck, or other vehicle, or from any station, station house, platform, or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own

use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or ..."

* * *

"Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

"The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed

in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

"To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. ..."

III

STATEMENT OF THE FACTS

In April of 1963, the Universal Carloading Company received the goods mentioned in Counts 2 and 4 in and through interstate commerce for ultimate delivery to consignees in California [R. T. 11, 12; 16, 17; 23; 26]. Co-defendant Tate was the truck driver who drove and embezzled the goods from the Universal Carloading Company depot [R. T. 20, 30, 32-33, 37-38, 155]. The proper ultimate consignees never received the goods in question [R. T. 43, 48, 64, 70]. Appellants then obtained possession of the stolen merchandise and stored the bulk of the goods in a garage near the home of the appellants [R. T. 80-81, 83]. Based upon information received from a reliable informant [R. T. 103, 108-110, 112], and continuous

police surveillance [R. T. 104-5, 116-118], the appellants were arrested. Appellant thereafter consented to a search of a garage where he and Thompson had stored the merchandise, contrary to appellant's argument in his brief that he and his family were threatened, he voluntarily consented [R. T. Vol. A]. Value of the goods mentioned in Counts 2 and 4 was in each case established as being in excess of $100. [R. T. 223-25; 254]. After the Government's case was completed, appellant Menefield without clearly negating his knowledge that the goods in issue were stolen, stated that he had purchased the goods from a casual acquaintance at a great savings [R. T. 243-249]. Finally [R. T. 256], appellant Menefield corroborates the involvement of appellant Thompson in the charged criminal violation by admitting that she had negotiated the lease of the garage and assisted him in storing the goods.

IV

SUMMARY OF ARGUMENT

I. The confession implicit in the admission of appellant Menefield was voluntary and not violative of the doctrine in Escobedo v. Illinois, infra.

II. The arrest was based upon probable cause. The search of the garage was consented to and in all respects proper.

V

ARGUMENT

Prefatory Contention

Appellee submits that appellants' entire brief should be stricken as not containing any specification of errors as required by Rule 18(2)(d) of the Rules of this court which provide in pertinent part as follows:

> "In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected and refer to the page number in the printed or typewritten transcript where the same may be found. ..."

See: Martin v. United States, 335 F.2d 945 (9 Cir. 1964);
Freeman v. United States, 279 F.2d 889 (9 Cir. 1960);
Everest & Jennings, Inc. v. E & J Manufacturing Company, 263 F.2d 258 (9 Cir. 1958)

I. USE OF THE CONFESSION OF APPELLANT MENEFIELD WAS PROPER

The appellants blandly state that the rule in Escobedo v. Illinois, 378 U.S. 478 (1964), precluded the use during the trial of the evidence obtained as a result of the admissions of appellant Menefield. The appellant substitutes conjecture for proper procedure when he surmises that the appellant (Menefield) might not have spoken, etc. (Page 18 of Appellant's Brief).

In opposition to such position by the appellant the Government respectfully submits as follows:

1. The appellant Menefield is a person with an admitted history showing involvement with shoplifters dating back to 1942 [R. T. 99]. Such an individual is obviously fully familiar with police procedures and cannot rely, naively, upon an unproven error in procedure.

People v. Dorado, 42 Cal. Rptr. 169 (1964) (dissenting opinion)

2. Failure by counsel to object to the introduction and use of appellant Menefield's admissions-confessions acts as a waiver of such objection. The admission into evidence of such incriminatory statements is not per se "plain error" under Rule 52(b), Federal Rules of Criminal Procedure.

Jackson v. United States, 337 F.2d 136 (D.C. Cir. 1964);

Moon v. United States, 137 F.2d 544 (D.C. Cir.

1962);

Timmons v. Peyton, 240 F. Supp. 749

(E. .D . Va . 1965);

United States v. Rundle, 241 F. Supp. 11

(E. D. Pa. 1965).

Another way of stating the same principle is that the defendant has the burden of providing the trial court with the opportunity of evaluating and considering, at first hand, any question which might be raised as to the voluntariness of the admission.

Ramirez v. United States, 294 F.2d 277, 282

(9 Cir. 1961);

Cellino v. United States, 276 F. 2d 941 (9 Cir. 1940);

Fiano v. United States, 217 F. 883 (9 Cir. 1959).

II. THE ARREST WAS VALID; THE SEARCH WAS PROPER

Appellant in his argument (page 19 of Appellant's Opening Brief), combines an objection as to arrest with an attack upon the search resulting therefrom. Appellee herein submits both facets of this argument are without basis.

A. The Arrest Was Valid

The lower court held a complete hearing [R. T. Vol. A], upon the issues raised by this argument and decided that there existed probable cause for the arrest, in that a reliable informant and police surveillance were together, the basis of the arrest [R. T. 103, 108-110, 112 and 104-5, 116-118].

The cases universally hold that when there is probable cause, an arrest even without a warrant is valid. Basically, it is held that the facts attendant upon the arrest must be considered in their entirety and must be weighed on the scales of reasonableness and common sense.

Draper v. United States, 358 U.S. 307 (1959);

Brinegar v. United States, 338 U.S. 160 (1949);

Carroll v. United States, 267 U.S. 132 (1925);

Rogers v. United States, 267 F.2d 79 (9 Cir. 1959);

Jones v. United States, 326 F.2d 124 (9 Cir. 1963).

In Williams v. United States, 273 F.2d 781 (9 Cir. 1959), wherein the procedural situation was almost on all fours with the instant appeal, in that the lower court had the opportunity of evaluating the witnesses who testified as to the facts of the arrest, this Court stated:

"On the hearing of the motion witnesses testified before the trial court. Thus the trial court had the opportunity to judge the credibility

of the witnesses and give consideration to the same in resolving the issue of 'probable cause'. We cannot say that the trial court's rulings were error."

See also Newcomb v. United States, 327 F. 2d 649 (9 Cir. 1964).

B. The Search Was Proper

A valid consent to search may be given by one who is in custody at the time of the consent.

United States v. Mitchell, 322 U. S. 65 (1944);

People v. Hickens, 165 Cal. App. 2d 364 (1958);

People v. White, 159 Cal. App. 2d 586 (1958).

Even if it is assumed that the law enforcement officers had time to secure a search warrant such fact would not vitiate an otherwise proper search of premises.

United States v. Rabinowitz, 339 U. S. 57 (1950);

Go-Bart v. United States, 282 U. S. 344 (1931);

Carroll v. United States, 282 U. S. 344 (1931).

Consent to a search constitutes a waiver of rights secured by the Fourth Amendment.

Amos v. United States, 225 U. S. 313 (1920).

The question of consent is one of fact and turns upon the weight of the evidence and on credibility and (as in the instant appeal), is a matter for the trial court to decide.

United States v. Bianco, 96 F. 2d 97 (2 Cir. 1938);

United States v. Dornblut, 261 F.2d 949

(2 Cir. 1938);

United States v. Page, 302 F.2d 81 (9 Cir. 1962).

The extent of a search conducted pursuant to voluntary consent is limited within the bounds of actual consent. In the instant matter consent was specifically given to the searching of the garage.

Karwicki v. United States, 55 F.2d 225

(4 Cir. 1932);

Harnig v. United States, 208 F.2d 916 (9 Cir. 1953).

The innuendo offered by the appliant that the Government has not met the burden placed upon it by the cases of McNabb v. United States, 318 U.S. 332 (1942) and Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951), is rendered specious by the obvious distinction (on the facts), between the McNabb and Judd cases and the instant matter. In McNabb the court stated, inter alia, (on p. 346), that "The mere fact that a confession was made while in the custody of the police does not render it inadmissible," the court suppressed the evidence based on the factual (oppressive, coercive) situation that resulted in the confession. In Judd, again, there existed (as found by the court), evidence of coercive oppressive treatment resulting in the obtaining of consent to search. In the instant matter the evidence clearly showed, and the lower court found, that the consent given by appellant was in truth and fact voluntarily granted.

CONCLUSION

For the reasons above submitted, it is respectfully requested that the appeal be denied and the judgment below sustained.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

/s/ Jules D. Barnett

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